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DATE: May 21, 1999

CASE NO.1998-INA-273

**In the Matter of:
TASTEE DINER RESTAURANT
Employer**

**On Behalf of:
FERNANDO ARGAEZ
Alien**

APPEARANCE: Paul S. Haar, Esquire
For the Employer

Certifying Officer: Richard E. Panati, Philadelphia, PA

Before: Holmes, Lawson, & Wood
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for labor certification. The certification of aliens for permanent employment is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. §1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 C.F.R. Part 656.

Under §212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and

the Employer's request for review, as contained in the Appeal File ("AF"), and any written arguments of the parties. 20 C.F.R. §656.27(c).

Statement of the Case

On April 22, 1996, Tastee Diner Restaurant ("Employer") filed an application for labor certification to enable Fernando Arguez ("Alien") to fill the position of "Grill Cook" which was classified by the Job Service as "Cook." The job duties for the position, as stated on the application, are as follows: "Nightshift cook in charge of all food prepared and served. Prepares for morning shift. Very reliable and hard working." The only stated job requirement for the position is two years of experience in the "Related Occupation" of "Cook" (AF 30).

In a Notice of Findings ("NOF") issued on October 15, 1997, the CO proposed to deny certification on the grounds that the Employer had rejected a qualified U.S. applicant for other than lawful job-related reasons, and failed to show that the job opportunity is clearly open to qualified U.S. workers, in violation of §656.21(b)(6) and §656.20(c)(8). (AF 20-22).

The Employer submitted its rebuttal on or about November 18, 1997 (AF 15-16). The CO found the rebuttal unpersuasive regarding the above stated grounds and issued a Final Determination on June 30, 1998, denying certification (AF 12-14).

On or about July 21, 1998, the Employer filed a "Request to Reconsider Denial" (AF 3-11). The CO denied the reconsideration request in a letter, dated August 5, 1998 (AF 2). Thereafter, the Employer filed an appeal, dated September 8, 1998 (AF 1). Subsequently, the CO forwarded this matter to the Board of Alien Labor Certification Appeals for review.

Discussion

An employer must show that U.S. applicants were rejected solely for lawful job-related reasons. 20 C.F.R. §656.21(b)(6). Furthermore, the job opportunity must have been open to any qualified U.S. worker. 20 C.F.R. §656.20(c)(8).

Although the regulations do not explicitly state a "good faith" requirement in regard to post-filing recruitment, such good faith requirement is implicit. H.C. LaMarche Enterprises, Inc., 87-INA-607 (Oct. 27, 1988). Actions by the employer which indicate a lack of good faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are thus a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient United States workers who are "able, willing, qualified and available" to perform the work. 20 C.F.R. §656.1.

On the Ad Response Forms, the Employer indicated that of the various U.S. applicants who answered the advertisements, only Mr. Gregg appeared for an interview (AF 27-28). However, the Employer's notations on the Ad Response Form regarding Mr. Gregg are confusing and conflicting. Specifically, the Employer answered "Yes" indicating that Mr. Gregg showed up for the interview scheduled on September 13, 1996. However, the Employer also noted: "No

show for interview. Called Back. I referred him to Bethesda Tastee Diner he went for interview but took a job w/ another company." (AF 27).

In response to a questionnaire from the Department of Labor, Licensing and Regulation, the U.S. applicant, Bruce Gregg, stated the following: 1. He called and made an interview for the position. 2. Mr. Gregg was interviewed by Mr. Gene W. Wilkes. 3. The interview was held in a fair and businesslike manner, albeit in a busy diner. 4. "The job went from a cook position at Silver Spring, MD to a Manager's position in Bethesda, MD." 5. The wage offered by the employer over the telephone or in the interview was not consistent with the salary offered in the advertisement. 6. He would have accepted the job offer at the salary offered in the advertisement. 7. The employer offered him "this job" (*i.e.*, the job of Manager at the Tastee Diner in Bethesda *not* the job of Cook at the Tastee Diner in Silver Spring). Finally, Mr. Gregg added: "I took the job because I needed to work. I was informed that I would be working 40 hours a week for \$420.00 a week. First week on the job I was informed that I will be working 48 hours a week and no overtime. Please call back (301) 856-5987." (AF 24-25).

In the Notice of Findings, dated October 15, 1997, the CO stated that the Employer had rejected a qualified U.S. applicant for other than lawful job related reasons. Specifically, the CO requested that the Employer explain the apparent discrepancies in the Employer's recruitment report regarding the interviewing of Mr. Gregg. The CO also directed the Employer to explain why Mr. Gregg was referred to the Tastee Diner in Bethesda. Furthermore, the CO instructed the Employer to provide information explaining why Mr. Gregg was hired below the stated wage offer. Finally, the CO noted that the burden of proof is on the Employer to show that U.S. workers are not able, willing, qualified or available for this job opportunity (AF 20-22).

The Employer's "rebuttal" consists of a letter, dated November 13, 1997, signed by John Littleton, General Manager, which states, in pertinent part:

On September 13, 1996 Mr. Gregg was contacted for an appointment regarding the position posted in the job bank of the Labor Department. Mr. Gregg was scheduled for an interview on September 14, 1996 at 10:00 a.m. He did not show up. Mr. Kevins Wilkes (who is no longer with the company) called him again and he came to speak with him on September 15, 1996. At the interview it was revealed Mr. Gregg had no restaurant cooking experience, but he had cooked in the Army, large batch military cooking. He said he had some management experience. We suggested him to apply at the Bethesda Tastee Diner as we knew they had an opening for and (sic) Assistant Manager.

It is my understanding that Bethesda Tastee Diner hired him as a night shift manager trainee. It is my knowledge that Mr. Gregg worked for a short period, and left due to conflicts. The Bethesda Tastee Diner is a separate distinct company and operation. It does it's (sic) own hiring and firing.

In our interview there was no need to explain about wages as Mr. Gregg had no experience as a Restaurant cook. Therefore, he was never hired below the stated wages

offered. He was referred to a different company for a different position with a different wage, He was not qualified to start as a cook.

(AF 16).

In the Final Determination, the CO found the Employer's rebuttal inadequate, stating, in pertinent part:

The only person with direct knowledge of this matter is Mr. Kevin W. Wilkes, who signed the Application for Alien Employment Certification as the General Manager. In the results of recruitment, Mr. Wilkes simply states that Mr. Gregg was referred to the Bethesda Tastee Diner, went for an interview, but took a job at another company.

The information provided in rebuttal by John Littleton, the General Manager, is from someone without direct knowledge of the situation. However, even accepting the rebuttal from Mr. Littleton, you have not satisfactorily addressed the issues cited in the Notice.

You still have not provided a lawful job-related reason as to why you rejected Mr. Gregg. Based on your Application, your minimum job requirements are 2 years experience as a Cook. You have admitted that Mr. Gregg has experience as a Cook in the Army. While you state that Mr. Gregg's experience was large batch military cooking, you have provided no information indicating why an individual with this experience could not perform the duties as outlined in your Application, which are "Night shift cook in charge of all food prepared and served. Prepares for morning shift. Very reliable and hard working." The skills, knowledge and abilities needed to cook are the same no matter where the cooking takes place. You have provided no documentation showing that Mr. Gregg could not perform the duties as outlined on your application. Therefore, your rejection of Mr. Gregg remains for other than lawful job related reasons.

(AF 14). We agree.

It is well settled that, in general, an applicant is considered qualified for a job if he or she meets the minimum requirements specified for that job in the labor certification application. United Parcel Service, 90-INA-90 (Mar. 28, 1991); Microbilt Corp., 87-INA-635 (Jan. 12, 1988). Furthermore, if an employer contends that such an applicant cannot perform the stated job duties, the employer must produce objective and detailed reasons for rejecting the applicant. Champion Zipper Corp., 92-INA-174 (Jan. 4, 1994).

In the present case, the interviewer for the Employer, Mr. Wilkes, initially did not report any specific deficiencies in Mr. Gregg's qualifications for the job as Cook. Yet, Mr. Wilkes steered the U.S. applicant to a different job with a different Tastee Diner (AF 27). Furthermore, on rebuttal, Mr. Littleton did not question whether the U.S. applicant met the stated job

requirements of 2 years in the related occupation of Cook. Instead, he stated that the Employer rejected Mr. Gregg based upon the unstated requirement that the experience as Cook must be in a restaurant setting (AF 16). We find such a basis for rejection to be improper, in the absence of detailed and objective evidence that Mr. Gregg could not perform the stated job duties. *See Columbia Grammar & Preparatory School*, 92-INA-410 (Apr. 6, 1994)(where the Employer improperly rejected a U.S. applicant with the required foreign language teaching experience, because it was not in an institutional setting).

Finally, we agree with the CO's denial of the Employer's reconsideration request, since the matters raised therein should have been presented as part of the rebuttal. *Royal Antique Rugs, Inc.*, 90-INA-529 (Oct. 30, 1991); *Harry Tancredi*, 88-INA-441 (Dec. 1, 1988)(en banc). Moreover, we note that the "evidence" presented on reconsideration consists of mere argument by Employer's counsel (AF 3-5), a letter by John C. Littleton which essentially restates his prior rebuttal letter (AF 6-7; *compare* AF 16), and a notarized statement by Kevin Wilkes, which consists of subjective statements regarding Mr. Gregg's purported inability to perform the Cook position and/or Mr. Gregg's apparent lack of interest in working as a Cook on a long term basis (AF 8).

In view of the foregoing, we find that labor certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

JOHN C. HOLMES
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure and maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon granting of the petition the Board may order briefs.